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No. 10-902

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In The Supreme Court of the United States

WALTER MCGILL,

Petitioner,

v.

GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia.[1] Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed, and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because the decision by the U.S. Court of Appeals for the Sixth Circuit erodes the protections for the free exercise of religion that Congress set forth when it enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488. The Rutherford Institute has represented, and continues to represent, individuals, religious assemblies, and institutions that are the intended beneficiaries of RFRA.

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[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. By letters dated January 31, 2011, the Rutherford Institute notified counsel of record for both parties in this case of its intent to file this *amicus* brief, and both parties have consented to the filing of this brief.

INTRODUCTION

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, enacted by Congress as a response to this Court's decision in *Employment Div., Department of Human Resources v. Smith*, 494 U.S. 872 (1990), sought to reinstate the requirement that the government justify the burden imposed on religious exercise by neutral laws of general applicability. Under RFRA, the government must demonstrate that a substantial burden to the exercise of religion is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(1)-(2). While this Court has held that Congress exceeded its constitutional powers in imposing this requirement on state and local governments, *City of Boerne v. Flores*, 521 U.S. 507, 529-36 (1997), the courts of appeals have upheld RFRA's constitutionality as applied to the federal government. *See, e.g.*, *Hankins v. Lyght*, 441 F.3d 96, 109 (2d Cir. 2006); *Christians v. Crystal Evangelical Free Church* (*In re Young*), 141 F.3d 854, 863 (8th Cir. 1998). The lower courts have uniformly permitted the invocation of RFRA as a defense by a religious institution or individual where the federal government is also a party to the lawsuit. The courts have disagreed, however, as to whether RFRA applies in a civil action between private parties that implicates federal law.

In this case, the U.S. Court of Appeals for the Sixth Circuit held that a private party may not invoke RFRA in a civil suit alleging trademark infringement and other violations of the Lanham Act. This unduly restrictive construction of RFRA — which is contrary to the law's language and purpose

— deprives individuals and religious institutions of an important statutory protection and warrants a review, and correction, by this Court.

SUMMARY OF THE ARGUMENT

The issue presented in the petition for certiorari warrants this Court's review. In enacting RFRA, Congress expressly stated that all federal laws of general applicability that impose a substantial burden on free exercise of religion must satisfy the "compelling government interest test." The potential imposition upon religious exercise is not decreased when the law is invoked by a private party in civil litigation. Indeed, a wide variety of private civil litigation involving federal anti-discrimination, intellectual property, or bankruptcy law presents serious risks of significantly burdening free religious exercise. This Court should intervene and clarify whether RFRA's strict scrutiny standard is available as a defense for civil litigants against this intrusion.

The availability of RFRA as a defense in private civil litigation is particularly important because existing statutory provisions or judicially crafted doctrines do not provide sufficient protection for religious exercise. The "ministerial exception," created by the courts for employment discrimination litigation, is a narrow doctrine that applies only in a limited set of circumstances. Federal intellectual property law lacks even this modest defense for instances where free exercise of religion may be burdened by a law of general applicability. Finally, even in the bankruptcy context, where Congress has enacted a law providing special accommodation for

religious exercise, only RFRA can provide protection for religious institutions facing bankruptcy. The availability of RFRA as a defense in private litigation is, therefore, an issue warranting this Court's review.

ARGUMENT

A. *The Applicability of RFRA's Strict Scrutiny Standard to Private Civil Litigation Is an Issue of Widespread Importance.*

The strict scrutiny standard of review prescribed by RFRA could serve as a powerful defense in a wide range of private litigation, ranging from employment discrimination disputes, to bankruptcy proceedings, to lawsuits over intellectual property rights. *See* Pet. at 23-24 (listing cases). This Court's intervention is necessary to establish uniformity with respect to the availability of RFRA to individuals or religious institutions forced to defend themselves against charges based on federal law.

The issue is particularly important in the context of employment disputes. Federal courts regularly entertain private civil lawsuits involving employment discrimination claims brought against religious organizations. This litigation often involves anti-discrimination claims brought by employees or former employees under Title VII of the Civil Rights Act of 1964 — ranging from allegations of racial discrimination, *see, e.g.*, *Boggan v. Miss. Conference of United Methodist Church*, 433 F. Supp. 2d 762, 763 (S.D. Miss. 2006), *aff'd*, 222 F. App'x 352 (5th Cir. 2007), to charges of gender and national origins

discrimination, *see, e.g.*, *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 700-04 (7th Cir. 2003). *See also Petruska v. Gannon Univ.*, 462 F.3d 294, 299-02 (3d Cir. 2006) (charges of gender discrimination). These lawsuits also frequently arise under the Age Discrimination in Employment Act of 1967 ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602. *See, e.g.*, *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 325-26 (3d Cir. 1993) (age discrimination charges brought by a former religious school teacher); *Guinan v. Roman Catholic Archdiocese*, 42 F. Supp. 2d 849, 850 (S.D. Ind. 1998) (charges of age discrimination brought by a Catholic elementary school teacher).

Both Title VII and the ADEA are laws of general applicability that are facially neutral towards religion. As such, under this Court's decision in *Smith*, a religious organization or its officials are not relieved of their obligation to comply with these laws "on the ground that the law proscribes (or prescribes) conduct that [their] religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation marks and citation omitted). Subsequent to *Smith*, the burden that Title VII and the ADEA may constitutionally impose on a religious organization in any specific case is no longer subject to this Court's "compelling state interest" test, even if the burden that the law places on religious practice is a substantial one. *Id.* at 886-87.

Yet, the burden that these facially neutral laws can impose on a religious organization may be considerable. The employment decisions made by a church or another religious organization often stem, at least in part, from ecclesiastical considerations. As

this Court has held, the First Amendment guarantees religious organizations the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115 (1952); *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-92 (1981) (the Free Exercise Clause protects religious organizations against burdens or restrictions on religion by ensuring the church's internal autonomy).[2] In anti-discrimination suits, however, the courts are often called upon to inquire whether a particular employment decision was motivated by a religious, as opposed to secular (and prohibited), purpose. *See, e.g.*, *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 169-71 (2d Cir. 1993) (permitting an inquiry into whether a Catholic parochial school's asserted religious reason for terminating a math teacher was genuine or mere pretext); *see also Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 223-24 (E.D.N.Y. 2006) (permitting, in a Title VII pregnancy claim, an inquiry into whether the

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[2] For this reason, the courts have developed the "ministerial exception" — a judicially created doctrine that generally insulates a church's employment decisions with respect to ministers and clergy from federal anti-discrimination statutes. *See, e.g.*, *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). As discussed below, *see infra* at 10-13, the ministerial exception is a doctrine of limited reach, and so cannot substitute for RFRA.

asserted religious reason for the allegedly discriminatory employment action was genuine).

The intrusion may be particularly acute where the charges contain allegations of actionable harassment under Title VII. Such statements are often made within the context of an internal church dialogue about issues involving church doctrine. *See, e.g., Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) (concluding that church officials' allegedly disparaging remarks regarding plaintiffs' sexual orientation "were part of an internal ecclesiastical dispute and dialogue protected by the First Amendment") (citations omitted). Moreover, because "[s]exual harassment claims under Title VII are directed towards conduct, mostly verbal, among employees and between employees and employers," such claims would "necessarily invite the most searching government examination of the details of what the [church employees] said to each other and in what manner." *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 803 (9th Cir. 2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

In sum, anti-discrimination lawsuits challenging a religious organization's employment decision carry with them the potential to hinder the free exercise of religion and interfere with the religious institution's internal procedures. The regularity with which such lawsuits are brought illustrates the need for this Court's intervention to clarify whether RFRA is available as a defense in private civil actions under federal anti-discrimination law.

Another context in which civil actions between private parties implicate the free exercise of religion

is litigation arising under federal intellectual property statutes, such as the Copyright Act, 17 U.S.C §§ 101-805, or the Lanham Act, 15 U.S.C. §§ 1051-1141n. In these cases, individuals face suits for copyright infringement or trade secrets misappropriation of material, the use of which they view as integral to their religious practice. *See, e.g., Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1113-4 (9th Cir. 2000) (copyright infringement); *Urantia Found. v. Maaherra*, 895 F. Supp. 1335, 1335-36 (D. Ariz. 1995) (copyright and trademark infringement); *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (copyright infringement and trade secrets misappropriation).[3] RFRA — if available as a defense to federal intellectual property laws enforced by private parties in civil actions — would provide much-needed constitutional protection to people of faith who are accused of infringing upon intellectual property rights.

A final area of tension between the free exercise of religion and federal laws of general applicability is the bankruptcy proceedings. When a religious organization files for bankruptcy, it becomes subject to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1330. These provisions do not contain any special accommodations or safeguards for religious institutions or individuals. *See, e.g., In re Roman Catholic Archbishop of Portland*, 335 B.R. 842, 862

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[3] Although *Vien* was decided several months prior to RFRA's enactment, it illustrates the type of lawsuits where the federal intellectual property law comes into tension with the free exercise of religion. *See infra* at 14-15.

(Bankr. D. Or. 2005) (the Bankruptcy Code requires an application of "neutral secular principles of law to determin[e a church's] rights in property"). Yet, a bankruptcy proceeding can potentially lead to a religious organization's loss of its property and other assets, with the consequent loss of the ability to worship for the organization's members.

The variety of contexts in which federal laws of general applicability are invoked in private civil litigation against religious institutions or individuals exercising their religious rights demonstrates the importance of having this Court provide definitive guidance as to whether RFRA's strict scrutiny standard may be used as a defense in this litigation.

B. *The Existing Statutory Defenses and Judicial Doctrines Are Insufficient to Protect Rights of Free Religious Exercise.*

In all of the above areas, existing defenses and doctrines designed to guard against unwarranted state encroachment on religious liberty are insufficient to provide meaningful protection for free exercise of religious rights that may be significantly burdened by neutral laws of general applicability.

1. The "Ministerial Exception" in the Employment Discrimination Context Is a Narrow Exception that Provides Only Limited Protection.

In the area of employment discrimination, courts of appeals have developed a so-called "ministerial exception" — a judicially created doctrine that generally proscribes the application of employment discrimination statutes to ministers and other clergy.

See, e.g., *McClure*, 460 F.2d at 558-61 (articulating the ministerial exception in the context of a Title VII discrimination claim); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039-41 (7th Cir. 2006) (applying ministerial exception to a claim under the ADEA); *Starkman v. Evans*, 198 F.3d 173, 174-77 (5th Cir. 1999) (applying ministerial exception to a claim under the Americans with Disabilities Act). The ministerial exception protects the free exercise rights of religious organizations by precluding courts from adjudicating anti-discrimination claims brought by members of the clergy against their religious employers. *See, e.g.*, *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

The ministerial exception, however, is narrow in scope. It is a "limited" exception that applies only to "employment discrimination suits brought by clergy members or other employees serving primarily religious roles." *Hankins*, 441 F.3d at 118 n.13 (Sotomayor, J., dissenting) (citing cases); *see also EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (the ministerial exception's "range of application is limited to spiritual functions" of the positions in question); *Geary*, 7 F.3d at 331 (the ministerial exception is limited to cases in which employees perform duties of a religious nature).[4]

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[4] Similarly, the "church autonomy doctrine," which "extends beyond the selection of clergy to other internal church matters," "does not apply to purely secular decisions," but only to decisions "'rooted in religious belief.'" *Bryce*, 289 F.3d at 657 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

Indeed, as the Sixth Circuit acknowledged below, "[t]he ministerial exception is a highly circumscribed doctrine." Pet. App. at 14a.

The ministerial exception does not shield a religious organization as employer from the laws of general applicability relating to lay employees that do not perform religious functions. *See, e.g.*, *Bollard v. Cal. Province of Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171-72 (4th Cir. 1985) (citing cases); *DeMarco*, 4 F.3d at 171. Consequently, "courts consistently have subjected the personnel decisions of various religious organizations to statutory scrutiny where the duties of the employees were not of a religious nature." *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360, 363 n.3 (8th Cir. 1991) (citing cases).

Indeed, on numerous occasions courts have held the ministerial exception inapplicable to religious institutions' employees who were not performing religious functions, and have permitted lawsuits against the institution to proceed. *See, e.g.*, *DeMarco*, 4 F.3d at 171-72 (a math teacher in a Catholic parochial school); *Geary*, 7 F.3d at 328-31 (a lay teacher at a religious school); *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 694-97 (W.D. Pa. 2004) (a Greek Orthodox diocesan registrar); *Stouch v. Bros. of Order of Hermits of St. Augustine*, 836 F. Supp. 1134, 1144 (E.D. Pa. 1993) (a chef at an Augustine monastery).

The personnel decision made with respect to a lay employee may, nonetheless, be based on religious considerations. The religious institution may counter the allegations of discrimination by asserting a

specific religious reason for the adverse employment action. Thus, in *DeMarco* a Catholic school argued that a terminated math teacher — whom the Second Circuit found to be a lay employee not encompassed by the ministerial exception — "was dismissed for reasons unrelated to his age, including failure to begin his classes with prayer and failure to attend Mass with his students." 4 F.3d at 168. The Second Circuit nevertheless reversed a grant of summary judgment for the school, concluding that the district court could "focus the trial upon whether DeMarco was fired because of his age or because of failure to perform religious duties," and that such inquiry could be conducted "without putting into issue the validity or truthfulness of Catholic religious teaching." *Id.* at 172. *See also Geary*, 7 F.3d at 329-31 (reversing a summary judgment for a church-operated elementary school's termination of a lay teacher where a disputed issue existed as to whether the termination was motivated by a religious reason); *Redhead*, 440 F. Supp. 2d at 222-24 (refusing summary judgment because a disputed issue existed as to whether the Seventh-day Adventist Church terminated a lay teacher "because of her sex and pregnancy or because of an evenly applied religious and moral code"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 348-50 (E.D.N.Y. 1998) (same).

This type of invasive inquiry, however, could constitute a significant and burdensome intrusion upon the religious institution's exercise of religious expression. *See, e.g.*, *Rayburn*, 772 F.2d at 1171 ("[a] Title VII action is potentially a lengthy proceeding [where c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross examination, the full panoply of legal process

designed to probe the mind of the church"). Quite often, "[s]uch an intrusion — even if not clumsy — will necessarily trespass upon ground that belongs to the Church." *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 975 (2004) (Trott, J., dissenting). The chilling effect of this burden on institutions of religion and their right of free exercise may be considerable. "[C]hurches will have to change their own conduct, rules, and theological doctrine to avoid coming into contact with the apparatus of the state." *Elvig*, 397 F.3d at 803 (Kleinfeld, J., dissenting from denial of rehearing en banc). In these instances — where the ministerial exception would not apply — RFRA's strict scrutiny requirement would be the only substantive protection available to a religious institution.[5]

2. The Existing Defenses Under Copyright and Trademark Law Do Not Provide Any Special Protection for Religious Exercise.

Unlike employment law, which has a developed a judicially crafted doctrine addressing free exercise rights, federal intellectual property law provides no special protection for an individual's (or an

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[5] While RFRA would supply such protection, it would not necessarily foreclose every anti-discrimination suit brought by a church employee. A court may well conclude, on the circumstances of a particular case and after applying the compelling governmental interest test prescribed by RFRA, that "the Title VII framework is the least restrictive means of furthering this compelling interest." *Redhead*, 440 F. Supp. 2d at 221-22 (permitting a pregnancy discrimination lawsuit after rejecting the ministerial exception and applying RFRA).

institution's) exercise of religious rights. While copyright and trademark law contains a range of defenses — notably, the right of fair use in the copyright context, 11 U.S.C. § 107, and the prior use doctrine in the trademark context, 15 U.S.C. § 1052(d) — these defenses are themselves religion-neutral. As such, they do not provide any accommodation for instances when, as in the present case, the application of the copyright and trademark law burdens religious exercise. RFRA — if available as a defense to federal laws enforced by private parties in civil actions — would provide a much-needed constitutional protection to persons and institutions of faith accused of infringing intellectual property rights.

Vien, 827 F. Supp. 629, which was decided several months prior to RFRA's enactment, illustrates vividly the need for RFRA's protections in the intellectual property context. In *Vien*, the Church of Scientology sued the defendant, a teacher, for copyright infringement and trade secrets misappropriation stemming from the defendant's use of the church's copyrighted materials in a course she independently offered. 827 F. Supp. at 632-33. The defendant countered that her use of the copyrighted material was integral to her practice of religion, and that the enforcement of federal copyright law imposed a burden on her free exercise rights. *Id.* at 635.

In the absence of RFRA, the only defense available to the defendant in *Vien* was the fair use doctrine. This doctrine provides that "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research, is not an infringement of copyright." 17 U.S.C. § 107. Having considered the applicable statutory factors, the district court held that the defendant was not entitled to fair use protection. *Vien*, 827 F. Supp. at 636. Rejecting the defendant's First Amendment defense, the district court observed that "neutral application of copyright and trade secret law to religious works does not offend the constitution." *Id.* at 635.

Court decisions rendered after RFRA's enactment illustrate the difference that application of RFRA's strict scrutiny analysis can bring to cases involving federal intellectual property laws. In *Worldwide Church of God*, 227 F.3d 1110, the Ninth Circuit considered whether RFRA could serve as a defense to a suit for copyright infringement where the defendant break-away church claimed that the copyrighted work was central to its religious practice. 227 F.3d at 1113-14. Observing that its analysis of the fair use defense was not affected "by the religious nature of [the] activity," *id.* at 1115, the Ninth Circuit concluded that the fair use doctrine did not protect the church's use of the copyrighted material, *id.* at 1120.

The Ninth Circuit then turned to the question of whether RFRA protected such use. The court of appeals, declining to decide whether RFRA applied to intellectual property disputes, held that the break-away church, in any event, had not "demonstrate[d] that the copyright laws subject[ed] it to a substantial burden in the exercise of its religion," since the requirement of paying for the use of copyrighted material did not amount to such a burden. *Id.* at 1121. In reaching this conclusion, the court noted

"the absence of evidence that [the church's] needs could not reasonably be accommodated under the copyright laws." *Id.*[6] Thus, if obtaining permission to legally distribute copies of the copyright work was impossible or cost-prohibitive, the "compelling government interest" analysis prescribed by RFRA may well have led to a different outcome. RFRA would offer protections for religious exercise that neutral defense doctrines, such as fair use, would not.

Indeed, the decision below presents a compelling example of how federal intellectual property laws of general applicability may burden free exercise rights. The Sixth Circuit acknowledged that "no one has questioned the sincerity of [Petitioner]'s belief that God requires him to continue his infringing use of plaintiff's marks" and observed, moreover, that "[b]eing compelled to stop could substantially burden his religious exercise." Pet. App. at 16a. Because the court of appeals refused to apply RFRA, however, *see* Pet. App. at 14a-21a, its analysis was limited to an inquiry into whether Respondents' name ("Seventh-day Adventism") was a generic term that cannot be trademarked, Pet. App. at 21a-31a. As a defense of general applicability, the "generic term" defense

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[6] Similarly, the court in *Urantia Foundation v. Maaherra*, 895 F. Supp. 1335 (D. Ariz. 1995), expressly applied RFRA's compelling interest test to a civil action to enjoin the defendant from infringing copyright and trademarks, and concluded that the test was satisfied. 895 F. Supp. at 1336-37. Just as in the employment context, RFRA's strict scrutiny analysis will not necessarily invalidate the application of a neutral federal law of general applicability; it will simply require a court to undertake an analysis that is sensitive to the burden that the law places on religious exercise.

afforded no protection to Petitioner's free exercise rights. *See* Pet. App. at 29a-30a.

3. The Existing Bankruptcy Law Does Not Provide Adequate Protection for a Religious Organization Filing for Bankruptcy.

Since its passage, courts have inconsistently applied RFRA in bankruptcy proceedings involving non-profit religious organizations. Congress partially remedied this problem when it enacted the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA"), Pub. L. No. 105-183, 112 Stat. 517. RLCDPA, however, nevertheless leaves religious institutions with inadequate protection in bankruptcy proceedings — protection that only RFRA's strict scrutiny standard can provide.

Prior to the passage of RLCDPA, courts disagreed over whether, in the context of an individual filing for bankruptcy, a trustee could avoid the individual's donations to a religious organization under certain conditions. *See* 11 U.S.C. § 548(a)(2) (now renumbered as 11 U.S.C. § 548(a)(1)). Some courts held that RFRA prevented a trustee from avoiding transfers made to churches and other religious organizations. *See, e.g.*, *In re Hodge*, 220 B.R. 386, 393 (D. Idaho 1998) (denying a trustee's avoidance claim on the grounds that "the application of the avoidance statutes to the [debtors] 'substantially burdens' the free exercise of their religious beliefs, and that although the avoidance statutes may be justified by a 'compelling governmental interest,' they are not the 'least restrictive means' of furthering that interest"); *see also In re Young*, 141 F.3d at 857, 863. Other courts, however, permitted trustees to recover

previous donations for the bankruptcy estate, finding that the avoidance statute did not run afoul of RFRA because it did not substantially burden the debtor. *In re Newman,* 203 B.R. 468, 477 (D. Kan. 1996); *In re Bloch*, 207 B.R. 944, 951 (D. Colo. 1997).

In 1998, RLCDPA restored uniformity to the treatment of religious donations, and provided religious institutions with specific protections with respect to these donations. RLCDPA created a safe harbor for qualifying religious contributions of up to fifteen percent of a debtor's gross income, or more if consistent with a debtor's previous giving pattern. *See* 11 U.S.C. §§ 544(b)(2), 548(a)(2), 1325(b)(2)(A)(ii); *see also In re Lewis*, 401 B.R. 431, 437 (Bankr. C.D. Cal. 2009). RLCDPA thus provides protection to religious organizations that are the recipients of debtor donations.[7]

While RLCDPA protects the assets of a religious organization when a contributing debtor files for bankruptcy, no provision of the Bankruptcy Code (aside from RFRA, which courts view as an amendment of the Code, *see In re Young*, 141 F.3d at

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[7] RLCDPA contains some exceptions, designed to prevent a debtor from circumventing the Bankruptcy Code. Thus, RLCDPA does not shield donations that are made in bad faith, *In re Jackson*, 249 B.R. 373, 377-78 (Bankr. D.N.J. 2000), donations that are considered a substantial abuse of the Bankruptcy Code, *In re Smihula*, 234 B.R. 240, 243-44 (Bankr. D. R.I. 1999), or payments that are not actually donations at all, *Watson v. Boyajian* (*In re Watson*), 309 B.R. 652, 662-63 (B.A.P. 1st Cir. 2004) (tuition for a private religious school is not protected by the RLCDPA), *aff'd*, 403 F.3d 1 (1st Cir. 2005), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 51.

861), protects a religious organization if the organization itself files for bankruptcy. A court's refusal to apply RFRA in this context could result in a religious organization's loss of its property and other assets, with the resulting loss of its members' ability to worship. Application of RFRA is therefore a necessary safeguard for religious organizations involved in bankruptcy proceedings.

Thus, the Bankruptcy Court for the District of Oregon has recognized that RFRA should apply in a bankruptcy proceeding. *In re Roman Catholic Archbishop of Portland*, 335 B.R. at 862-63. The bankruptcy court examined, on summary judgment, whether the debtor, the Catholic Archdiocese of Portland, had to include in its estate property held in trust for member parishes and schools, and whether the trustee could avoid parishioners' interests in the parish property. The court concluded that avoiding parishioners' unrecorded beneficial interests in the property under 11 U.S.C. § 544(a)(3) could potentially impose a substantial burden on the free exercise of religion, because the requisite sale of churches and schools could "leave[] the parishioners and school children with no place to worship and study." 335 B.R. at 864. The court also rejected the argument that there was a compelling governmental interest in applying section 544(a)(3), "if doing so would impose a substantial burden on the exercise of religion." *Id.*

By contrast, other courts have failed to apply or even to address the applicability of the RFRA to bankruptcy proceedings. *See, e.g., In re Faith Missionary Baptist Church*, 174 B.R. 454, 466-69 (Bankr. E.D. Tex. 1994) (allowing seizure of church

funds to satisfy individual alter ego's tax liens without application of RFRA).

The importance of RFRA is evident in light of the unique circumstances of a debtor church. Corporate debtors have the ability to reorganize in bankruptcy rather than liquidate, so as to maximize their value to creditors. While a church may seek the same relief, it would face greater difficulties than a for-profit corporation in showing that an organization supported largely (if not entirely) through donations will be more valuable if allowed to continue to operate. *See Provident Mut. Life Ins. Co. v. Univ. Evangelical Lutheran Church of Seattle*, 90 F.2d 992, 995 (9th Cir. 1937) (refusing to affirm a church reorganization plan as largely a "visionary and hopeless scheme for financial rehabilitation"); *see also In re Miracle of Church in God in Christ*, 119 B.R. 308, 309-10 (Bankr. M.D. Fla. 1990). RFRA therefore is particularly important, because it would provide religious organizations with protection where traditional bankruptcy law may not.

In light of the drastic impact that bankruptcy proceedings can have on the ability to worship, courts should apply the RFRA to all bankruptcy disputes involving religious organizations. This does not mean that a court should *per se* allow such organizations additional protection, but rather that a court should evaluate the impending action with strict scrutiny. *See* 42 U.S.C. § 2000bb–1(a)-(b). In this way, RFRA would ensure that burdensome federal laws are closely scrutinized for their impact on religious exercise, while not precluding unduly the application of federal law where justified by the compelling governmental interest.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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